(4)

No. 01-332

Supreme Court, U.S.
FILED
DEC 20 2001
CLERK

In The

Supreme Court of the United States

BOARD OF EDUC. OF INDEPENDENT SCHOOL DIST. NO. 92 OF POTTAWATOMIE COUNTY,

Petitioner,

v.

EARLS, ET AL.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE DRUG-FREE SCHOOLS COALITION; NATIONAL INSTITUTE OF CITIZEN ANTI-DRUG POLICY; MALCOLM K. BEYER, JR.; DRUG-FREE KIDS: AMERICA'S CHALLENGE; DRUG-FREE AMERICA FOUNDATION; NATIONAL FAMILIES IN ACTION; INSTITUTE ON GLOBAL DRUG POLICY OF THE DRUG FREE AMERICA FOUNDATION; LEGAL FOUNDATION AGAINST ILLICIT DRUGS; DRUG AND ALCOHOL TESTING INDUSTRY ASSOCIATION; THE HON. JOHN E. PETERSON, MEMBER OF CONGRESS, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DAVID G. EVANS, ESQ.
(Counsel of Record)
175 Oak Grove Rd.
Pittstown, NJ 08867
908-788-7077
Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

39pp

QUESTION PRESENTED

Whether a public school must have a drug problem among its students to create a "special need" to conduct random drug and alcohol testing on the students to deter the students from drug and alcohol use.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iv

INTEREST OF *AMICI*..... 1

SUMMARY OF THE ARGUMENT..... 1

LIST OF AMICI..... 2

POINT ONE
BECAUSE DRUG AND ALCOHOL USE BY STUDENTS INTERFERES WITH THE FUNDAMENTAL PURPOSE OF PUBLIC SCHOOLS AND STUDENTS HAVE A DIMINISHED EXPECTATION OF PRIVACY, PUBLIC SCHOOLS HAVE A "SPECIAL NEED" TO IMPLEMENT RANDOM DRUG TESTING OF STUDENTS TO DETER SUBSTANCE USE AND TO HELP SCHOOLS ACHIEVE THEIR FUNDAMNETAL PURPOSE.... 5

POINT TWO
BECAUSE PUBLIC SCHOOLS HAVE A "SPECIAL NEED" TO RANDOMLY TEST STUDENTS FOR SUBSTANCE USE, PUBLIC SCHOOLS ARE NOT REQUIRED TO SHOW DRUG OR ALCOHOL USE BY STUDENTS PRIOR TO IMPLEMENTING RANDOM TESTING. THE NEED TO DETER DRUG USE BY STUDENTS IS A RATIONAL BASIS FOR UPHOLDING RANDOM DRUG TESTING..... 19

a. Schools do not have to show drug use among students to implement random testing when drug testing is a condition of participating in voluntary privileges such as athletics or other extracurricular activities..... 21

TABLE OF CONTENTS – Continued

Page

POINT THREE
SUSPICION-BASED DRUG TESTING IS NOT A REASONABLE ALTERNATIVE TO RANDOM TESTING..... 25

POINT FOUR
IF SOME SUBSTANCE USE MUST BE SHOWN TO JUSTIFY TESTING, THE STANDARD IS SATISFIED IF THERE IS "SOME EVIDENCE" OF STUDENT SUBSTANCE USE..... 28

CONCLUSION..... 29

TABLE OF AUTHORITIES

Page

CASES

Anable v. Ford, 653 F. Supp. 22 (W. D. Ark. 1985) 7

Aubrey v. School Bd. of Lafayette Parish, 148 F.3d 559 (5th Cir.1998) 7

Brennan v. Board of Trustees, 691 So. 2d 324 (La. Ct. App.1997) 7

Brousseau v. Town of Westerly, 11 F. Supp. 2d 177 (D.R.I. 1998) 7

California v. Latasha W., 70 Cal. Rptr. 2d 886 (Cal. Ct. App.1998) 7

Chandler v. Miller, 520 U.S. 305 (1997) 28

Colorado Seminary v. N.C.A.A., 570 F.2d 320 (9th Cir.1978) 22

Committee for G.I. Rights v. Callaway, 518 F.2d 466 (CA DC 1975) 30

DesRoches, 11 v. Caprio, 156 F.3d 571 (4th Cir. 1998) 7

Florida v. J.A., 679 So. 2d 316 (Fla. Dist. Ct. App.1996) 7

Goss v. Lopez, 419 U.S. 565 (1975) 29

Griffin v. Wisconsin, 483 U.S. 868 (1987) 8

Hamilton v. Tennessee Secondary School Athletic Ass'n, 552 F.2d 681 (6th Cir. 1976) 22

Hedges v. Musco, 33 F. Supp. 2d 369 (D.N.J. 1999) ..7, 26

Jevic v. Coca Cola, 5 I.E.R. Cases 765, 1990 WL 109851 (D.N.J. 1990) 24

TABLE OF AUTHORITIES – Continued

Page

Joy v. Penn-Harris-Madison School Corp., 212 F.3d 1052 (7th Cir. 2000).....7, 20

K.L. et al. v. Bd. of Ed. of Hopewell Valley Regional School Dist., 1991 S.L.D. 1322 (School Law Decisions, N.J. Commissioner of Education)..... 23

Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361 (6th Cir. 1998), *cert. denied*, 528 U.S. 812 (1999) 7, 9, 28

Loder v. City of Glendale, 927 P.2d 1200 (1997) *cert. denied*, 522 U.S. 807 (1997) 24

Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) 8

Miller v. Wilkes, 172 F.3d 574 (8th Cir. 1999).....7, 20

Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970)..... 23

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 8, 21, 30

New Jersey v. T.L.O., 469 U.S. 325 (1985).....5, 6, 14, 15

New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., 151 N.J. 531 (1997)..... 21

O'Connor v. Bd. of Education, 645 F.2d 578 (7th Cir. 1981), *cert. denied*, 454 U.S. 1084 (1981); *on remand*, 545 F. Supp. 376 (N.D.Ill. 1982) 22

Pierce v. Smith, 117 F.3d 866 (5th Cir. 1997)..... 7

TABLE OF AUTHORITIES – Continued

Page

Plyler v. Doe, 457 U.S. 202 (1982) 13

Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988) 15

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) 8, 26, 30

Superintendent v. Hill, 472 U.S. 445 (1985) 29

Todd v. Rush County Schools, 983 F. Supp. 799 (SD IN 1997), *affd*, 133 F.3d 984 (7th Cir. 1998) 6

Todd v. Rush County Schools, 133 F.3d 984 (7th Cir. 1998), *cert. denied*, 119 S.Ct. 68 (1998) .. 15, 20, 23, 24

Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998) 9

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 8

United States v. Skipworth, 482 F.2d 1272 (5th Cir. 1973) 24

University of Colo. v. Derdeyn, 863 P.2d 929 (Colo. 1993) 7

Vernonia School District v. Acton, 515 U.S. 646 (1995) ..... *passim*

Wisconsin v. Angelia D.B., 564 N.W.2d 682 (Wis. 1997) 7

FEDERAL STATUTES

U.S. Constitution Amendment IV 5, 6, 7, 27

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

"Collective Statistics Concerning Drug Use," Drug Enforcement Administration, Demand Reduction Section, Compiled February 2001 citing the CASA National Survey of American Attitudes on Substance Abuse VI: Teens, February 28, 2001 10

"Impact of Peer Substance Use on Middle School Performance in Washington" Division of Alcohol and Substance Abuse, Department of Social and Health Services, State of Washington, Seattle, Washington, http://www.hspc.org 16

144 *Congressional Record* S345-02,S362 and see 144 *Congressional Record* H11044-03, H11228 10

1997 CASA National Survey of Teens, Their Parents, Teachers and Principals, Joseph A. Califano and Alyse Booth, The National Center on Addiction and Substance Abuse at Columbia University, September 1997 11

1998 CASA National Survey of Teens, Teachers and Principals, The National Center on Addiction and Substance Abuse at Columbia University, 1998 11

2000 National Household Survey (Department of Health and Human Services, Washington, DC), www.samhsa.gov 11

John Brick, *Drugs the Brain and Behavior, The Pharmacology of Abuse and Dependence* (Haworth Medical Press, New York, 1998) 14

Carlos Villarreal, "Culture in Lawmaking: A Chicano Perspective", 24 *U.C. Davis L. Rev.* 1193, 1205 (1991) 13

David G. Evans, *Drug Testing Law Technology and Practice* (West Group 1991) 18

TABLE OF AUTHORITIES – Continued

Page

Drug Use, Negative Outcomes Linked in Dropout Study, *Alcoholism and Drug Abuse Week.*, Aug. 21, 1995, at 2 13

Developing Drug-free School Policies and Procedures, Drug-Free Schools Coalition, PMB 327, 203 Main St., Flemington, NJ 08822 8

DuRant, et al. "Weapons Carrying on School Property Among Middle School Students" *Journal of the AMA,* Vol 153, No. 1, January, 1999 13

Edward Imwinkelreid, "Some Preliminary Thoughts on the Wisdom of Governmental Prohibition or Regulation of Employee Urinalysis Testing", 11 *Nova Law Review* 563, 588 (1987)..... 26

Hunterdon Central study, Drug-Free Schools Coalition, 203 Main St, PMB 327, Flemington, NJ 08822, 908-284-5080, fax 908-284-5081 .....8, 17

Kandel, et al., "The Consequences in Young Adulthood of Adolescent Drug Involvement", 43 *Archives of Gen. Psychiatry* 746, 753 (1986)..... 15

Malignant Neglect: Substance Abuse and America's Schools. The National Center on Addiction and Substance Abuse at Columbia University, September 5, 2001 12

Nancy J. Flatt-Moore, "Comment & Note, Public Schools and Urinalysis: Assessing the Validity of Indiana Public Schools' Student Drug Testing Policies After *Vernonia*" 1998 *BYU Educ. & L.J.* 239, 240 n.7 16

Richard A. Hawley, "The Bumpy Road to Drug-Free Schools", 72 *Phi Delta Kappan* 310, 314 (1990) 15

TABLE OF AUTHORITIES – Continued

Page

Select Comm. on Narcotics Abuse and Control, 99th Cong., 2d Sess., Drugs and Dropouts 2 (Comm. Print 1986)..... 12

Stephen M. Fogel et al., "Survey of the Law on Employee Drug Testing", 42 *U. Miami L. Rev.* 553, 561 n.34 18

Stuart Greenbaum, "Drugs, Delinquency, and Other Data", *Juvenile Justice,* Spring/Summer 1994, at 2, 3, 6 14

Subcommittee on Econ. Growth, Trade, and Taxes, 102d Cong., 1st Sess., Doing Drugs and Dropping Out 52 (Comm. Print 1991)..... 12

Tetsuji Yamada et al.,"The Impact of Alcohol Consumption and Marijuana Use on High School Graduation" 13 (National Bureau of Econ. Research Working Paper No. 4497, 1994)..... 12

The American Drug and Alcohol Survey, RMBSI, Inc., 419 Canyon, Suite 316, Fort Collins, CO 80521, telephone 800-447-6354..... 17

Todd W. Estroff et al., "Adolescent Cocaine Abuse: Addictive Potential, Behavioral and Psychiatric Effects", 28 *Clinical Pediatrics* 550, 555 (1989) 15

U.S. Pub. Health Serv., Alcohol and Other Drug Abuse in Adolescents, 50 *Am. Fam. Physician* 1737 (1994)..... 13

Willard Daggett, *Achieving Civility at School: A Case Study* (Leadership Press, book can be ordered from the Intl. Center for Leadership in Education, Rexford, NY 12148)..... 17

INTEREST OF *AMICI*[1]

We dedicate this brief to the families who have lost children to drugs and alcohol. May we ever be mindful of their loss.

Amici are parents, grandparents, students, parent and other drug-prevention organizations, corporations, and distinguished legal, medical and scientific experts, policy makers, and others who all share a common dedication to helping schools and children become drug and alcohol-free. Our vulnerable school children have been prey to drug traffickers for too long. The international makeup of the *Amici* reflects the international concern that illicit drug use is undercutting traditional values and threatening the very existence of stable families, schools, communities, and government institutions throughout the world.

SUMMARY OF THE ARGUMENT

Amici assert that because drug and alcohol use by students interferes with the fundamental purpose of public schools and students have a diminished expectation of privacy, public schools have a "special need" to implement random drug testing of students in order to deter substance use and to help the schools achieve their fundamental purposes of educating and protecting young people.

---

[1] The parties have consented to the filing of this brief. (See Appendix A.) Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Because public schools have this "special need" to randomly test students for substance use, the schools are not required to show drug or alcohol use by students prior to implementing random testing. The need to deter drug use by students is a rational basis by itself for upholding random drug testing.

Even if some substance use must be shown to justify testing, the standard is satisfied if there is "some evidence" of student substance use in support of the testing. The school can gather the necessary information by having a hearing on the subject prior to implementing a drug testing program.

LIST OF AMICI

Alex J. Romero, Arizonans for Drug-Free Youth and Communities; Ambassador Melvyn Levitsky, Professor of International Relations and Public Administration, Syracuse University, Syracuse, NY; Angie Heim, Green Bay, Wisconsin; Arlene Seal, Ph. D., Positive Moves, Creating a Safe and Healthy World, PA; Australian Parents for Drug-Free Youth, Maryborough Queensland, Australia; Because I Love You (BILY), Chadds Ford, PA; Bensinger DuPont & Associates, Bethesda, MD; Beverly Kinard, President Christian Drug Education Center, Canon City, CO; Carla Lowe, Carmichael, CA; Daniel Bent, Esq., former U.S. Attorney, District of Hawaii; Debra K. Delp, Don't Be An Ostrich, Chadds Ford, PA; Doctors for Life, Kloof, South Africa; Donald Ian Macdonald, M.D, F.A.S.A.M, former White House Drug Policy Advisor, Bethesda, MD; Donnie R. Marshall, former Administrator U.S. Drug Enforcement Administration (DEA); Dr. Verel R. Salmon, Superintendent of Schools, Millcreek Township School District, Erie, PA; Drug Watch-Minnesota, David Taylor, LCDC,

LSW, Duluth, MN; Drug and Alcohol Testing Industry Association, Alexandria, VA; Drug-Free Kids: America's Challenge, Carolyn Burns, Vice President, Louisville, KY; Drug-Free Kids: America's Challenge, Joyce Nalepka, President, Silver Spring, MD; Drug-Free America Foundation, Inc., St. Petersburg, FL; Drug Watch-Hawaii, Chair, Jeanette McDougal, MM,CCDP, Honolulu, HI; Drug-Free Schools Coalition, Flemington, NJ; Educating Voices, Inc., Naperville, IL; Eleanor Scott, Westminster, CO; Eric Voth, MD, Topeka, KS; Erie County Drug and Alcohol Coalition, Erie, PA; General Arthur Dean, Community Anti-Drug Coalitions of America (CADCA), Alexandria, VA; Gerri Silverman, Short Hills, NJ; Ginger Katz, Courage to Speak Foundation, Inc., Norwalk, CT; H. E. R. O. I. N. Hurts, Inc. Middletown, DE; Harry F. Connick, Esq., District Attorney of New Orleans, LA; Institute on Global Drug Policy of the Drug-Free America Foundation, St. Petersburg, FL; Institute for Behavior & Health, Bethesda, MD; International Students in Action, Oxford, England; John C. Lawn, former Administrator, U.S. Drug Enforcement Administration (DEA); John Keith, Esq., Cox Hanson, Halifax, Nova Scotia, Canada; John Wertime, Arlington, VA; Julie Murdoch, Esq., Bensinger, DuPont & Associates; June M. Milam, Jackson, MS; Kathleen Berry, Mother of Divine Grace Drug Awareness Group, Philadelphia, PA; Larry Katz, Courage to Speak Foundation, Inc., Norwalk, CT; Leah Cox , Concerned Citizens for Drug Prevention, Inc. Hanover, MA; Legal Foundation Against Illicit Drugs, St. Petersburg, FL; Linda B. Ledger, Vice President of the New Jersey Federation for Drug-Free Communities; Maine

South Alliance for Drug-Free Youth, William Breault, Worcester, MA; Malcolm K. Beyer, Jr., Jupiter, FL; Michael J. DeFeo, Avitar, Inc., Canton, MA; Mina Seinfeld de Carakushansky, former Drug Prevention Secretary of the City of Rio de Janeiro, Brazil; MOMSTELL, Kathy Berry, Philadelphia, PA; Nancy Starr, Pennsylvania Delegate, Drug Watch International, Erie, PA; National Families in Action, Atlanta, Georgia; National Family Partnership, Dade County, FL; National Hispano/Latino Community Prevention Network; National Institute of Citizen Anti-Drug Policy, DeForest Rathbone, Great Falls, VA; Nora L. Drexler, President/CEO, Kids Interacting Drug-Free Coalitions of America, Teen Anti-Drug Coalitions of America, Erie, PA; Northwest Center for Health and Safety, Portland, OR; Otto and Connie Moulton, Committees of Correspondence, Danvers MA; Otto Hauswirth, M.D., International Scientific and Medical Forum on Drug Addicts, Austria; Peggy Sapp, President, Informed Families of Dade County, FL; Peter Bensinger, former Administrator U.S. Drug Enforcement Administration (DEA); Reed Irvine, Accuracy in Academia, Accuracy in Media, Washington, D.C.; Richard Bucher, Ph.D.; Robert L. Dupont, M.D., former Director National Institute on Drug Abuse (NIDA); Robert B. Charles, Esq., former Chief Counsel and Staff Director to House of Representatives Speaker's Task Force on Drugs; Ruby Schaaf, R. N., The Chemical People, Erie County, PA; Sharon Smith, MOMSTELL (Moms on a Mission to Advocate for Drug Treatment, Education and to Lobby for Legislation), Mechanicsburg, PA; Stephanie Haynes, Save Our Society From Drugs (S.O.S.), Alpine, TX ; Steven H. Steiner,

Dads and Mad Moms Against Drug Dealers; Substance Abuse Program Administrator's Association, Ira Jane Hurst-Romero, C-SAPA, Germantown, MD; Susan Gillespie, Arlington, VA; TEAMCares, Inc., Joyce Lips, Chair of the Board of Directors, Las Vegas, NV; The Hon. John E. Peterson, Member of Congress; Thomas A. Constantine, former Administrator U.S. Drug Enforcement Administration (DEA); Tinker Cooper, Families Against Drugs, Orlando, FL; Tommy Jones Foundation, Granite Quarry, NC; Wev Shea, Esq., former U.S. Attorney, District of Alaska, Anchorage, AK; William R. Caltrider, Jr., President, Center for Alcohol and Drug Research and Education, Towson, MD

POINT ONE

BECAUSE DRUG AND ALCOHOL USE BY STUDENTS INTERFERES WITH THE FUNDAMENTAL PURPOSE OF PUBLIC SCHOOLS AND STUDENTS HAVE A DIMINISHED EXPECTATION OF PRIVACY, PUBLIC SCHOOLS HAVE A "SPECIAL NEED" TO IMPLEMENT RANDOM DRUG TESTING OF STUDENTS TO DETER SUBSTANCE USE AND TO HELP SCHOOLS ACHIEVE THEIR FUNDAMENTAL PURPOSE

The Fourth Amendment to the United States Constitution provides that the government shall not violate the right of the people to be secure in their persons against unreasonable searches. *U.S. Constitution Amendment IV*. Normally, searches are only permitted upon probable cause and a warrant. This privacy protection against unreasonable searches applies to all levels of government and covers students in public schools. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). A drug test is considered a

"search" of a person's bodily fluids, thus, students who are subject to drug testing by a school must have their privacy interests weighed against the school's interest in testing to determine if the testing is "reasonable" under the Fourth Amendment. *Vernonia School District v. Acton*, 515 U.S. 646, 652-653 (1995).[2]

In *Vernonia School District v. Acton*, the Supreme Court (hereinafter "the Court") sought to resolve the issue of whether a school's interest in deterring high school athletes from using drugs through the use of random drug testing outweighed the privacy interest of the students. The Court upheld the drug testing program by focusing on the need of schools to conduct testing but reserved the question of whether drug testing programs may be extended to other contexts, such as extracurricular activities. The instant case will decide that issue.

Since 1985, the Court has recognized that public school students maintain a diminished expectation of privacy within the school system. *New Jersey v. T.L.O.*, 469 U.S. at 348. In school search cases, the courts now apply a "special needs" analysis to determine whether searches in public schools are reasonable under the Fourth Amendment, i.e., there must be a "special need" of the school to conduct a search that makes it impracticable to require the school to have probable cause and a warrant before conducting the search.[3]

---

[2] The term "drug test" in this brief can apply to drug and alcohol tests. "Drug" means a drug that is used illegally. Alcohol for minors is an illegal substance.

[3] See, *Todd v. Rush County Schools*, 983 F. Supp. 799 (SD IN 1997) *affirmed* by 113 F.3d 984 (7th Cir. 1998), *cert. denied*, 119 S.Ct. 68 (1998); *Hedges v. Musco*, 33 F. Supp. 2d 369 (D.N.J. 1999); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998), *cert. denied*, 528 U.S. 812 (1999) (school mandatory, suspicionless drug and alcohol testing of teachers was constitutional and other officials in "safety-sensitive" positions); *DesRoches, 11 v. Caprio*, 156 F.3d 571 (4th Cir. 1998) (proposed search of a student backpack was reasonable); *Aubrey v. School Bd. of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998) (school's interest in mandatory, suspicionless drug testing of employee outweighed employee's privacy interests due to school employment context); *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997) ("special needs" existed when "student-employee" with diminished expectations of privacy was drug tested subsequent to an alleged violation of hospital policy by slapping a disorderly patient); *Brousseau v. Town of Westerly*, 11 F. Supp. 2d 177 (D.R.I. 1998) (government's interest in safety of students was compelling and urgent enough to authorize warrantless pat-down search of student when large knife was missing from the school cafeteria); *Anable v. Ford*, 653 F. Supp. 22 (W. D. Ark. 1985) (school policy requiring drug testing of any student who violated school substance abuse code was improper and unconstitutional but voluntary alcohol test was proper); *California v. Latasha W.*, 70 Cal. Rptr. 2d 886 (Cal. Ct. App. 1998) (random metal detector weapon search of high school students did not violate the Fourth Amendment); *University of Colo. v. Derdeyn*, 863 P.2d 929 (Colo. 1993) (university's random drug testing of student athletes was held to be unconstitutional); *Florida v. J.A.*, 679 So. 2d 316 (Fla. Dist. Ct. App. 1996) (school policy permitting random, suspicionless weapons searches of students was reasonable); *Brennan v. Board of Trustees*, 691 So. 2d 324 (La. Ct. App. 1997) (student-athletes had diminished expectation of privacy in face of a university's and NCAA's significant interests in student drug testing); *Wisconsin v. Angelia D.B.*, 564 N.W.2d 682, (Wis. 1997) (search of student and student's coat was reasonable); *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999) (extracurricular); *Joy v. Penn-Harris*

If a school has a "special need," the courts have recognized that mandatory, suspicionless drug testing is

"reasonable" in certain instances. In applying this "special needs" rationale to drug testing in public schools, the courts balance the following factors: (1) the nature and immediacy of the governmental concern; (2) the nature of the student's privacy interests; and (3) the character of the intrusion. *Vernonia School District v. Acton*, 515 U.S. at 646.

In the instant case we expect that the Court will also deal with the first of these factors, the nature of the governmental interest, by providing guidance on whether a school must show evidence of drug use by students to justify random drug testing of students in athletics or extracurricular activities.[4]

The Court has stated that "The importance of deterring drug use by all this Nation's schoolchildren cannot be doubted." *Vernonia School District v. Acton*, 515 U.S. at 646. *Amici* agree with the Court and assert that the evidence shows that drug and alcohol use by students is a

---

Madison School Corp., 212 F.3d 1052 (7th Cir. 2000) (extracurricular and parking on campus); in non-school contexts see, *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Griffin v. Wisconsin*, 483 U.S. 868 (1987)

[4] Random selection means a mechanism for selecting students for drug tests that (1) results in an equal probability that any student from a group of students subject to the selection mechanism will be selected, and (2) does not give a school discretion to waive the selection of any student selected under the mechanism. *Developing Drug-free School Policies and Procedures*, Drug-Free Schools Coalition, PMB 327, 203 Main St., Flemington, NJ 08822, phone 908-284-5080.

compelling interest that justifies drug testing of students to deter drug use.

When drugs invade a school, threatening the safety of students and disturbing the orderly learning environment, the school's interest in ridding the school of drugs outweighs the privacy interests of students. The school years are a critical passage in a young person's life. While in school, children face the challenge of learning in the academic, social, physical, and emotional realms. When drugs infect a school, the learning process is crippled. Children become casualties (several of the *Amici* have lost children to drugs or alcohol). The physical and psychological effects of drug and alcohol use can cause lifelong and profound losses. Substance use decreases a child's chances of graduation and academic success. It creates danger in classrooms and increases the risk of accidents when students drive to and from school. Researchers continually report statistics demonstrating that student drug and alcohol use is at a dangerous level.[5] For example, the National Center on Addiction and Substance

---

[5] See *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 375 n.12 (6th Cir. 1998), *cert. denied*, 528 U.S. 812 (1999) (the prevalence of drug use by our nation's youth is beyond dispute); see, *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1110 (Colo. 1998). In this case, an independent research firm, the Search Institute of Minneapolis, Minnesota, conducted an attitudinal and behavioral survey on the school's students, finding that 44% of students in grades six through twelve had used drugs in the last year. Of the sixth-grade students, 23% used drugs in the last year, and an alarming 63% used drugs in the eleventh grade. Further, 63% of the school's seniors had at least used marijuana once during their lives, while 13% reported using cocaine at least once. Also, 20% of the eighth graders frequently used drugs. Drug-use at the school exceeded

Abuse (CASA) at Columbia University reports that for the last six years school children have listed drugs as the most important problem they face.[6]

According to the 2000-2001 Parents' Resource Institute for Drug Education (PRIDE) survey, 39% of 12 graders smoked marijuana in the last year, 7.9% used cocaine, 11.3% used hallucinogens, and 62.4% drank alcohol. PRIDE obtains data from more than 8,500 school systems and 7.5 million students in 49 states. The surveys are designated by Congress as a measure of illicit drug use by youth.[7]

The National Household Survey conducted by the federal Department of Health and Human Services measures substance use in the general population age 12 and older. The 1999-2000 survey had 50,000 youths (12-17) participating in the survey. The survey indicates that there are 9.7 million underage drinkers in the U.S., including 6.6 million who are binge drinkers. On the

---

national averages by a significant margin (noting that only 35% senior marijuana use and 6% cocaine use compared to Trinidad's 63% and 13% usage, respectively). *Id.* at 1098-99.

[6] "Collective Statistics Concerning Drug Use", Drug Enforcement Administration, Demand Reduction Section, Compiled February 2001 citing the CASA National Survey of American Atitudes on Substance Abuse VI: Teens, February 28, 2001. The CASA survey is available from CASA at www.casacolumbia.org

[7] 144 *Congressional Record* S345-02, S362 and see 144 *Congressional Record* H11044-03, H11228, see www.pride surveys.com

average day, 3,814 youths try marijuana for the first time.[8]

In 1997, a survey of middle and high school students, teachers, principals, and parents was conducted for the National Center on Addiction and Substance Abuse (CASA) at Columbia University.[9] The study revealed that high school students see more drug deals at school than in their neighborhoods. The study reports the following:

> 76% of high school students claim that drugs are kept, used or sold on school grounds.
>
> 29% of high school students claim that a student in their school died from a drug or alcohol-related incident in the past year.
>
> 74% of high school students claim that a student was expelled or suspended for possessing, using or selling drugs in the past year.
>
> Teens are more likely to encounter drugs on school grounds or in their schools than on their neighborhood streets: more high school students have witnessed drug sales at school (41%) than in their neighborhoods (25%).

---

[8] 2000 National Household Survey (Department of Health and Human Services, Washington, DC) www.samhsa.gov

[9] *1997 CASA National Survey of Teens, Their Parents, Teachers and Principals*, Joseph A. Califano and Alyse Booth, The National Center on Addiction and Substance Abuse at Columbia University, September 1997. CASA did a study in 1998 the *1998 CASA National Survey of Teens, Teachers and Principals* with similar results. They are available from CASA at www.casacolumbia.org

Teens, parents, teachers and principals support firm steps to keep drugs out of schools, including drug testing of students.

Most teachers (57%) believe that drugs have diminished the quality of education in our nation's schools.

A 2001 study by CASA revealed that substance abuse adds at least $41 billion dollars to the costs of elementary and secondary education in terms of special education, teacher turnover, truancy, property damage, injury, counseling, and other costs.[10]

There is a definite correlation between drug use and dropouts. Students who drink alcohol or use drugs are statistically less likely to graduate from high school than those who abstain.[11] Students leaving school with an inadequate education are more likely to be unemployed, to depend on the welfare system, and to commit violent

---

[10] *Malignant Neglect: Substance Abuse and America's Schools.* The National Center on Addiction and Substance Abuse at Columbia University, September 5, 2001, available from CASA at www.casacolumbia.org

[11] Select Comm. on Narcotics Abuse and Control, 99th Cong., 2d Sess., Drugs and Dropouts 2 (Comm. Print 1986). An increased dropout rate harms not only the students dropping out, but the entire society. Dropouts cost the nation billions during their lifetimes. See also, Subcommittee on Econ. Growth, Trade, and Taxes, 102d Cong., 1st Sess., Doing Drugs and Dropping Out 52 (Comm. Print 1991). See Tetsuji Yamada, et al., "The Impact of Alcohol Consumption and Marijuana Use on High School Graduation" 13 (National Bureau of Econ. Research Working Paper No. 4497, 1994).

crimes.[12] Recent studies confirm that students who use drugs are more likely to bring guns and knives to school leading to school violence.[13] Drug use is implicated in a significant number of suicides and homicides among adolescents.[14]

A strong correlation between drug use and juvenile delinquency is documented in a study sponsored by the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention. The study drew on data from three projects that studied some 4000 youths over a five year period. The study found that the more involvement a youth had with drugs, the more likely that youth was involved in delinquency. The findings (by age 16 one-half of the youths studied were using alcohol on a

---

[12] See, e.g., *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (noting that inadequate education adds "to the problems and costs of unemployment, welfare, and crime"); Carlos Villarreal, "Culture in Lawmaking: A Chicano Perspective", 24 *U.C. Davis L. Rev.* 1193, 1205 (1991) (noting increased welfare, job-training, and incarceration costs "attributable to inadequate education"). See also, "Drug Use, Negative Outcomes Linked in Dropout Study", *Alcoholism and Drug Abuse Week*, Aug. 21, 1995, at 2 (explaining that drug use is a good predictor of school dropout patterns). The study surveyed a group of 1243 adolescent dropouts in California. Reports indicated that 29.5% of the dropouts tried an illegal drug by the age of twelve, compared to only 8.3% of students that age still in school. The dropouts' weekly rates of alcohol, marijuana, and cocaine use were two, five, and ten times the rates of use by students attending school.

[13] DuRant, et al. "Weapons Carrying on School Property Among Middle School Students," *Journal of the AMA*, Vol. 153, No. 1, January, 1999.

[14] U.S. Pub. Health Serv., Alcohol and Other Drug Abuse in Adolescents, 50 *Am. Fam. Physician* 1737 (1994).

regular basis and about 25% were using marijuana), prompted the researchers to recommend that prevention programs begin as early as elementary school.[15]

Drug use can interfere with memory, sensation, and perception. Drugs distort experience and can cause a loss of self-control that can lead users to harm themselves or others. They interfere with the brain's ability to take in and analyze information. Drug use can have an insidious effect on perception; for example, cocaine and amphetamine users often have a false sense of functioning at their best while using the drugs. Drug use erodes self-discipline and motivation which is essential for learning.[16]

The Court has recognized a school's duty to maintain an adequate learning environment, a component of which is that students are restrained from using drugs. Schools must be allowed to use all reasonable means to combat drug and alcohol use if education is to be successful. As the Court has stated, "the effects of a drug-infested school are visited not just upon the user, but upon the entire student body and faculty, as the educational process is disrupted." *Vernonia School District v. Acton*, 515 U.S. at 662. In *New Jersey v. T.L.O.*, 469 U.S. at 342 n.9, the Court noted that "The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and

---

[15] Stuart Greenbaum,"Drugs, Delinquency, and Other Data", *Juvenile Justice*, Spring/Summer 1994, at 2, 3, 6.

[16] See, John Brick, *Drugs the Brain and Behavior, The Pharmacology of Abuse and Dependence* (Haworth Medical Press, New York, 1998).

committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities." Drug problems among students are "one of the particularly ugly forms in which school disciplinary problems commonly arise in present-day America." *Id.* at 339. The Seventh Circuit Court of Appeals noted that "If the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment." *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1324 (7th Cir. 1988); see also *Todd v. Rush County Schools*, 133 F.3d 984, 986 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 68 (1998) (citing *Schaill* for the same proposition).

The Court has noted that maturing nervous systems are more critically impaired by intoxicants than mature ones are and childhood losses in learning are lifelong and profound. Children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. *Vernonia School District v. Acton*, 515 U.S. at 661.[17]

---

[17] Quoting Richard A. Hawley, "The Bumpy Road to Drug-Free Schools", 72 Phi Delta Kappan, 310, 314 (1990); see also Todd W. Estroff *et al.*, "Adolescent Cocaine Abuse: Addictive Potential, Behavioral and Psychiatric Effects," 28 *Clinical Pediatrics* 550, 555 (1989) (concluding that there is a direct causal link between the progression and severity of cocaine abuse and the progression and severity of addictive psychiatric, and psychobehavorial systems among the adolescents); Kandel, et al., "The Consequences in Young Adulthood of Adolescent Drug Involvement," 43 *Archives of Gen. Psychiatry* 746, 753 (1986) (following 1004 young men and women from ages 15 and 16 to age 25 and observing that prior use predicts future use and

Students who avoid drug use during their high school years are not likely to subsequently use drugs; but if they later do, they more easily can stop using them. A comprehensive study of about 10,000 sixth and seventh grade students in 57 schools in the state of Washington showed that students whose peers had little or no involvement with drinking or drugs scored higher on standard math and reading tests than students whose peers used alcohol or drugs.[18]

Drug testing can help students stay away from drugs. Drug testing gives students a reason to say "no" when their peers ask them to use drugs.

Our young people state that drugs are their number one problem. Adults must listen. We must recognize that adults can help. Many schools have anti-drug programs, including student drug testing programs, that have proven to be highly effective in substantially reducing drug use.[19] Random drug testing is a narrow exception

---

that "[u]se of a drug initiates a cascade of events and consequences that is amplified by the regenerative interaction of initial drug use and its subsequent use").

[18] "Impact of Peer Substance Use on Middle School Performance in Washington" Division of Alcohol and Substance Abuse, Department of Social and Health Services, State of Washington, Seattle, Washington, http://www.hspc.org

[19] See Nancy J. Flatt-Moore, "Comment & Note, Public Schools and Urinalysis: Assessing the Validity of Indiana Public Schools' Student Drug Testing Policies After *Vernonia*," 1998 *BYU Educ. & L.J.* 239, 240 n.7.

intended to give schools a stronger weapon to get drugs out of schools. School drug testing programs are a proven low-cost method to win the fight for our children's future. Schools implementing drug testing experience a substantial reduction in drug use.[20]

Drug testing is an extremely effective deterrent as was proven by the Hunterdon Central Regional High School in Flemington, New Jersey. Prior to implementing random drug testing in 1997, the school conducted a survey of student drug use. The survey took students about 35 minutes to complete and covered their history of drug and alcohol use and the frequency and intensity of their current substance use. The survey has built in controls to ensure accuracy and to detect erroneous or exaggerated responses with approximately 40 different consistency checks.[21]

After conducting the 1997 survey, Hunterdon Central implemented mandatory random drug testing for all student athletes. Approximately half of the student body participated in athletics. Prior to implementing random

---

[20] Willard Daggett, *Achieving Civility at School: A Case Study* (Leadership Press, book can be ordered from the Intl. Center for Leadership in Education, Rexford, NY 12148, phone 518-399-2776); for additional information contact: Natl. Inst. of Citizen Anti-Drug Policy, 1044 Springvale Rd., Great Falls, VA 22066; Drug-Free Schools Coalition, PMB 327, 203 Main St., Flemington, NJ 08822, phone 908-284-5080.

[21] The American Drug and Alcohol Survey is available from RMBSI, Inc., 419 Canyon, Suite 316, Fort Collins, CO 80521, telephone 800-447-6354: the Hunterdon Central study is available from the Drug-Free Schools Coalition at 203 Main St, PMB 327, Flemington, NJ 08822, 908-284-5080, fax 908-284-5081.

testing, the school had in place a student counseling and education program and conducted drug searches. In 1999, the survey was conducted again. There had been no changes in the school anti-drug program except the introduction of random testing.

The 1999 survey showed that of the 28 categories of drug use evaluated by the survey, drug use went down in 20 categories. For example, in the highest risk drug use category of "Multi-Drug Users" the rates went down as follows:

9th grade – 57% decrease

10th grade – 100% decrease

11th grade – 14% decrease

12th grade – 52% decrease

Random drug testing has proven effective in decreasing drug use by students. Drug testing programs in other contexts has also enjoyed remarkable success.[22]

---

[22] David G. Evans, *Drug Testing Law Technology and Practice* (West Group 1991) Sections 105-6; see, e.g., Stephen M. Fogel, et al., "Survey of the Law on Employee Drug Testing", 12 *U. Miami L. Rev.* 553, 561 n.34, 562 (noting 65% to 80% success rate rehabilitating company employee drug users as well as drop in U.S. Navy drug use from 47% in 1981 to 4% in 1984).

POINT TWO

BECAUSE PUBLIC SCHOOLS HAVE A "SPECIAL NEED" TO RANDOMLY TEST STUDENTS FOR SUBSTANCE USE, PUBLIC SCHOOLS ARE NOT REQUIRED TO SHOW DRUG OR ALCOHOL USE BY STUDENTS PRIOR TO IMPLEMENTING RANDOM TESTING. THE NEED TO DETER DRUG USE BY STUDENTS IS A RATIONAL BASIS FOR UPHOLDING RANDOM DRUG TESTING

One of the questions before this Court is the level of drug use required before a school can implement random drug testing. In *Vernonia School District v. Acton*, 515 U.S. at 665, the Court permitted random drug testing of high school athletes. Because the athletes were drug ringleaders and the school was in a state of virtual rebellion, this decision has been misinterpreted by some to hold that a school must be "out of control" with drugs before testing is authorized. However, the specific facts in *Vernonia* regarding the high incidence of drug use among student athletes were merely noted by the Court with other significant factors to support the immediacy of the governmental concern. *Vernonia School District v. Acton*, 515 U.S. at 662-3. The Court did not require that specific evidence of drug or alcohol use by students be demonstrated to satisfy the showing of a "special need." The special need stems from the facts that children are more susceptible to the ill effects of drug and alcohol use than adults and that drug and alcohol use not only hurts the students themselves but causes disruptions and discipline problems that harm the educational process in general. *Vernonia School District v. Acton*, 515 U.S. at 654-55. To require a school to show drug use by students before testing means that the students must already be suffering

from the detrimental effects of drug use before a preventative measure can be taken. It is the same as requiring that there be an epidemic before inoculations can occur.

The Court has observed that schoolchildren routinely submit to mandatory physical examinations, vaccinations against disease, vision and hearing tests, dental and dermatological tests, and scoliosis screening. These are preventative measures that do not require a showing that these diseases are rampant in the school. *Vernonia School District v. Acton*, 515 U.S. at 656.

In the case of *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 68 (1998), a logical extension of the *Vernonia* decision was applied to students who participate in all extracurricular privileges, and not just athletics. In upholding the school's voluntary random drug testing of all students who participated in extracurricular activities, the Seventh Circuit placed little significance on whether the school district had an acute drug problem. Rather, the court merely noted that a survey of the school in 1994 revealed that students in certain grades used cigarettes and alcohol more than the state average, while marijuana use in certain grades was actually lower than the state average. *Id.* at 985. In *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), the court determined that deterrence of the use of drugs in school, even absent an immediate crisis or any record of a drug problem at the school, is a sufficient reason to allow a school to engage in random drug testing. *Id.* at 580. See also, *Joy v. Penn-Harris-Madison School Corp.*, 212 F.3d 1052 (7th Cir. 2000) (drug testing was reasonable for extracurricular activities and for students parking at school).

The courts have upheld drug testing in non-school contexts where an employer could not show an increase in, or even a problem with, drug use. See, e.g., *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668-69, 673-74 (1989) (upholding testing for Customs Services employees). See also, *New Jersey Transit PBA Local 304 v. New Jersey Transit Corp.*, 151 N.J. 531, 564 (1997) (no drug problem among transit officers). Thus, a school's inability to demonstrate an out of control drug problem to a court should not prohibit the Court from finding that a school has a legitimate interest in deterring student drug use. *Vernonia School District v. Acton*, 515 U.S. at 665.

a. Schools do not have to show drug use among students to implement random testing when drug testing is a condition of participating in voluntary privileges such as athletics or other extracurricular activities.

When students wish to exercise the privilege of participating in extracurricular activities, they do so voluntarily, and must submit to any of a number of conditions placed on that participation. Extracurricular activities are privileges sponsored by the school to which the school commits money, facilities, and human resources. Because of the expense and devotion of resources, schools have the right, if not the obligation, to ensure that the funds devoted to these activities are well spent on sober and alert participants. Students should be given the opportunity to take full advantage of these experiences by having classmates who are drug free.

In addition, schools often heavily regulate extracurricular activities, frequently requiring a dress code, minimum grade point average, and mandatory attendance and even regulation of free speech. Finally, the school remains in "custody" of the students participating in athletics or extracurricular activities even when such activities are not on school grounds and is responsible for their safety and health, especially when a school staff member supervises the participants. *Vernonia School District v. Acton*, 515 U.S. at 657. These conditions naturally flow from the school's obligation to maintain order, safety and discipline in the school, particularly in the arena of athletics, where the injury risk is greater. *Id.* at 662.

Further, students voluntarily enroll in the extracurricular activities because these are privileges that convey a benefit. These privileges carry with them enhanced prestige, benefits and possible leadership roles. As such, these students serve as an example to other students creating a "role model" effect which could filter down to all students at school whether or not involved in activities.

Students do not have a right to these privileges. For example, it is well settled that participation in interscholastic athletics is not a constitutional right protected by the United States Constitution. See, e.g., *Colorado Seminary v. N.C.A.A.*, 570 F.2d 320 (9th Cir. 1978); *Hamilton v. Tennessee Secondary School Athletic Ass'n*, 552 F.2d 681 (6th Cir. 1976). Nor is such participation a property right. *O'Connor v. Bd. of Education*, 645 F.2d 578 (7th Cir. 1981), *cert. denied*, 454 U.S. 1084 (1981); *on remand*, 545 F. Supp. 376 (N.D.Ill. 1982). Such activities are also outside the

protection of due process. *Mitchell v. Louisiana High School Athletic Ass'n*, 430 F.2d 1155 (5th Cir. 1970). See also *K.L., et al. v. Bd. of Ed. of Hopewell Valley Regional School Dist.*, 1991 S.L.D. 1322 (School Law Decisions, N.J. Commissioner of Education) (all extracurricular activities, up to and including commencement exercises, are considered "privileges" which can be forfeited as a result of proscribed behavior).

Student-athletes must have a preseason physical, acquire insurance coverage or sign an insurance waiver, and comply with rules of conduct, dress, grade point average, training hours and other rules as may be established for each sport. Students engaged in extracurricular activities often must also obtain insurance or sign insurance waivers for any extracurricular activity that extends the school's liability beyond the normal school-context, such as field trips, outings, events, conferences, and competitions away from school. They may have to subscribe to additional requirements, such as when the activities have required attire, training rules, or hours of practice and rehearsal, or other general regulations. Some extracurricular activities will not have the same elements of lack of privacy such as the communal undressing and locker room as athletics, but many extracurricular activities have elements of shared exposure to other student participants when performing specified activities such as the putting on of an organization's uniforms, or the general need to change into different required clothes for a particular event. See *Vernonia School District v. Acton*, 515 U.S. at 657 and *Todd v. Rush County Schools*, 133 F.3d at 986.

It follows that the voluntary undertaking of an extracurricular activity shows a student's affirmative choice to abide by a particular activity's additional rules and regulations. The court in *Todd v. Rush County Schools*, 133 F.2d at 986, summed it up by noting that: (1) all extracurricular activities are a valuable experience and a privilege with associated prestige enhancing benefits; (2) a drug testing program serves only as a condition of participation in the extracurricular activity; (3) the school's program applies only to those students who voluntarily choose to participate; (4) the students participating in activities may take on leadership roles and serve as examples to others; and (5) the school has an interest in protecting the health of the students.

Courts have held that voluntary participation in an activity that subjects a person to a search renders the search constitutionally permissible. In *Jevic v. Coca Cola*, 5 I.E.R. Cases 765, 1990 WL 109851 (D.N.J. 1990), the plaintiff challenged an employer's withdrawal of an employment offer when the applicant failed a drug test. The court held that if the plaintiff "felt the test was in any way humiliating, his ever present option was to walk away." *Id.* at 1990 WL 109851 (page 10). See also, *Loder v. City of Glendale*, 927 P.2d 1200 (1997), *cert. denied*, 522 U.S. 807 (1997) (preemployment testing). Voluntariness was also a substantial factor in the decision in *United States v. Skipworth*, 482 F.2d 1272 (5th Cir. 1973), upholding searches of persons about to fly where the court noted that passengers have every opportunity to avoid the procedure by not entering the boarding area.

Given its deterrent and non-punitive purposes as utilized by Petitioner, random testing does not bar the

student from participating, but only serves as a condition to the student's participation in the desired activity. Drug testing programs as advocated by Petitioner do not criminalize the individual student's behavior, but only protect students from injury and health risks associated with drug and alcohol use. The student makes a contract with the public school, i.e., choosing to be substance free for the privilege of participating in extracurricular activities. Because drug testing programs as advocated by Petitioner only serve a deterrent purpose, testing students who voluntarily participate in extracurricular activities is a reasonable and constitutional search.

POINT THREE

SUSPICION-BASED DRUG TESTING IS NOT A REASONABLE ALTERNATIVE TO RANDOM TESTING

Suspicion-based testing is not a reasonable alternative to random testing. There are two forms of suspicion-based testing (1) testing based on reasonable-suspicion that an individual is under the influence (2) evidence that a group of students uses drugs more than other groups of students.

Testing performed on a reasonable-suspicion basis alone will not be successful. Burdening teachers with the task of identifying drug users adds a heavy responsibility to their already time-pressured days. It is not realistic to assume that they will be monitoring students on a constant basis. Further, reasonable-suspicion testing relies on a sometimes subjective choice by a teacher which, as the Court noted in *Vernonia School District v. Acton*, may lead teachers to refer troublesome students not just those who

are suspected of using drugs. *Vernonia School District v. Acton*, 515 U.S. at 663. The Court has rejected a reasonable-suspicion standard for drug testing railroad employees as impractical because drug impaired people seldom display any outward signs detectable by lay persons or even physicians. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 628 (1989).

Suspicion-based testing may also be unreliable due to the possibility of error or bias. For example, Professor Edward Imwinkelreid, an expert in scientific evidence, has stated that when it comes to reasonable-suspicion testing in employment "there are literally hundreds of psychological studies demonstrating that lay eyewitness testimony is prone to a high degree of error. Urinalysis testing is demonstrably more reliable. The employer's personal evaluation of the employee is intensively subjective – much less objective than a urinalysis test."[23]

An example of error is found in the case of *Hedges v. Musco*, 33 F. Supp. 2d 369 (D.N.J. 1999) when a high school student was referred for drug testing based on her teacher noticing that her face was flushed, her eyes were glassy and red, her pupils appeared very wide, and she seemed very talkative and outgoing even though she was usually quiet along with other uncharacteristic behavior. A drug test was performed and it was negative.

---

[23] Edward Imwinkelreid, "Some Preliminary Thoughts on the Wisdom of Governmental Prohibition or Regulation of Employee Urinalysis Testing," 11 *Nova Law Review* 563, 588 (1987).

Reasonable-suspicion testing limits the number of students tested because a reasonable-suspicion program demands particularized suspicion for every student selected and therefore generally tests fewer students than programs based on random selection. This decreases the number of drug-using students deterred and thus reduces the program effectiveness. Although reasonable suspicion may be less intrusive because fewer students are affected, the Court already has determined that the Fourth Amendment does not demand the "least intrusive" means possible. *Vernonia School District v. Acton*, 515 U.S. at 663.

Reasonable suspicion could be used to discriminate against rude students, racial or ethnic minorities, or simply unlikable students. Such discriminatory selection opens the door to student lawsuits. Random selection cures this problem by eliminating discretion in selecting students. Random testing guards against discrimination toward certain individuals or classes.

Respondents may claim that the school should only test students who are already identified as having disciplinary problems, i.e., a suspect class of likely drug users. This method is a form of reasonable-suspicion testing because it imputes suspicion of drug use on to students who break school rules. This type of testing may be underinclusive because not every student using drugs will face disciplinary charges and overinclusive because not every discipline problem involves a drug user. More importantly, the determination as to what behavior constitutes a disciplinary violation that warrants a drug test creates the same difficulties as identifying signs of drug use. Selection on such an arbitrary standard raises the

same problems with discriminatory testing that the Court has avoided through its approval of blanket testing in *Vernonia School District v. Acton*.

Requiring that a school show that student athletes and those who participate in extra curricular activities are involved in drugs more than other students is impractical. By the time the data is collected about a specific group of students and a program is put in place there would be a new group of students enrolled. The numbers could change from year to year and the school would be in a constant state of having to demonstrate documented drug and alcohol use. This could waste a considerable amount of the schools resources better spent on deterring drug and alcohol use.

POINT FOUR

IF SOME SUBSTANCE USE MUST BE SHOWN TO JUSTIFY TESTING, THE STANDARD IS SATISFIED IF THERE IS "SOME EVIDENCE" OF STUDENT SUBSTANCE USE

If a school can demonstrate that a drug problem exists, it tips the equities in favor of upholding random testing. *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 373-74 (6th Cir. 1998). "A demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime, would shore up an assertion of special need for a suspicionless general search program." *Chandler v. Miller*, 520 U.S. 305, 306 (1997).

If the Court requires documentation of a drug problem, *Amici* assert that the standard of "some evidence" be

used to find the program reasonable. *Superintendent v. Hill*, 472 U.S. 445 (1985) (some evidence required in institutional disciplinary hearing), see also *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975) (holding that the due process rights of a student facing suspension are satisfied by the provision of notice and a "rudimentary" hearing).

There is a proposed New Jersey law on student drug testing that requires "Each board of education is to hold a public hearing prior to the adoption of a drug testing policy." *N.J. Senate Bill* 433, Introduced January 11, 2000. This would provide "some evidence" and would give opponents and proponents of the plan a chance to be heard. Holding a hearing will enable the school to gather data and other evidence and to hear community concerns about the testing program. *Amici* assert that this gathering of data from a hearing will be sufficient.

Such a requirement will help to prevent arbitrary deprivation of student rights without threatening school interests or imposing undue administrative burdens on the school. Ascertaining whether the "some evidence" standard is satisfied does not require a detailed examination, independent assessment of witnesses, or weighing of evidence, but, instead, the relevant question is whether there is any evidence to support the need for a school's drug testing program. *Superintendent v. Hill*, at 455.

CONCLUSION

Our nation uses random drug testing to provide for safe transportation and our national security by testing our military personnel, customs agents and railway

workers. *Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (CA DC 1975) (military); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (customs agents) and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (railroad employees). Our interest in student safety, health, and educational quality should not be derailed by student drug use and is equally compelling. We must be willing to defend our children with the same tools we use to defend our transportation system and our nation. Our children deserve no less.

Respectfully submitted,

DAVID G. EVANS, ESQ.
(Counsel of Record)
175 Oak Grove Rd.
Pittstown, NJ 08867
908-788-7077
Counsel for Amici Curiae